IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-653

WILLIAM SWISHER, et al,
Appellants,

v.

DONALD BRADY, et al,
Appellees.

On Appeal From the United States
District Court For the District of Maryland

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES

PAUL HALVONIK,
State Public Defender of California

GARY S. GOODPASTER,
Chief Assistant State
Public Defender

LAURANCE S. SMITH,
Deputy State Public Defender

455 Capitol Mall, Suite 360
Sacramento, California 95814
Telephone: (916) 322-5298

Attorneys for Amicus Curiae

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MOTION OF THE STATE PUBLIC DEFENDER OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The State Public Defender of the State of California hereby respectfully moves for leave to file the attached brief amicus curiae in this case in support of appellees. The consent of the attorney for the appellees has been obtained. The consent of the attorney for appellants was requested but refused.

The California State Public Defender is an agency of California State Government which is charged with the representation on appeal of indigent criminal defendants,

including minors whose cases are heard by Juvenile Courts.

The basic structure of the Juvenile Court law of California resembles that of Maryland in its use of subordinate judicial officers (referees) to try the bulk of juvenile cases, with comparable provisions existing for the independent final determination of such matters by a duly authorized judge. As in Maryland, such final determination may be either by means of a trial de novo or by reading of the record of proceedings before the referee.

It is the desire of Amicus Curiae to alert the Court to the significance of a constitutional issue which looms strongly in the background of the instant case; namely, whether it is consistent with due process for an independent trial-level determination of criminal guilt to be accomplished through a procedure whereby a case is tried before a judicial officer who does not have authority to decide it, and then decided by another judicial officer who did not hear it.

This issue is placed in the immediate background of the double jeopardy controversy

by virtue of the assertion of both appellants and the Maryland Court of Appeals that Maryland juvenile cases are not, in fact, decided by the masters who hear them, but by judges who review a mere record of the master's proceedings.

Although the theoretical possibility of this type of factfinding exists under both Maryland and California law, its practical significance to the administration of juvenile justice has been made the greater in California by a series of California Supreme Court decisions beginning in 1975 (In re Edgar M. (1975) 14 Cal.3d 727; 122 Cal. Rptr. 574, 537 P.2d 406) which have approved of and encouraged the practice.

Since the practice of trial-by-transcript has, evidently, been less widespread in Maryland than in California, it's constitutionality has not been focused upon in the briefs of either appellants or appellees However, it is not difficult to envision the possibility that the Court might write an opinion herein which could, perhaps unwittingly, decide the double jeopardy issues raised by the parties in such a way as to cause the dubious practice of trial-

by-transcript to become even more entrenched in California than it is now, as well as causing the practice to spread to other states.

For this reason, and due to the great impact a decision of this case will have upon the many juveniles for whom amicus is counsel in the California courts,[1] we seek the Court's permission to file the attached brief.

Respectfully submitted,

PAUL HALVONIK,
State Public Defender

GARY S. GOODPASTER,
Chief Assistant
State Public Defender

LAURANCE S. SMITH,
Deputy State Public Defender

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(1) The Supreme Court of California presently has under submission the case of Jesse W. v. Superior Court (Ct. App. 1976) 133 Cal. Rptr. 870, Hrg. gtd. December 29, 1976, SF # 23480, the issues which are substantially identical to those here, and which will be controlled by this Court's disposition of the instant case.

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GARY S. GOODPASTER,
Chief Assistant State
Public Defender

LAURANCE S. SMITH,
Deputy State Public Defender

455 Capitol Mall, Suite 360
Sacramento, California 95814
Telephone: (916) 322-5298

Attorneys for Amicus Curiae

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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DUE PROCESS REQUIRES THAT STATES GIVE THE POWER TO DECIDE CASES TO THE SAME CLASS OF JUDICIAL OFFICERS IT EMPOWERS TO HEAR THEM

Appellant State of Maryland has taken the position that the juvenile appellees were not subjected to double jeopardy under a Maryland procedure whereby they were tried before a subordinate judicial officer known as a master; and, when exonerated of the charges by the master, subjected to a second consideration of the evidence by a duly authorized judge, either upon consideration of the record or upon a "live" retrial. (Md. Ann. Code, Cts & Jud. Proc. Art § 3-813(c).)[1a]

Section 3-813(c) is limited in its operation by rule 910e, Maryland Rules of Court. This rule provides that when the State takes exception to the master's findings, the judge must determine the matter for himself on the basis of the record, supplemented by such additional evidence as is

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1a. Rule 910a, Maryland Rules of Court, provides for the recording of proceedings before a master by either stenographic or electronic means. According to evidence

not objected to by the parties. The procedure involved is thus strikingly similar to that condemned in this Court's seminal decision in Kepner v. United States (1904) 195 U.S. 100, wherein the Phillipine Supreme Court's substitution of a judgment of conviction for the trial court's finding of innocence on the basis of their review of the trial record was held to constitute double jeopardy.

The question of whether such readjudication by a judge constitutes double jeopardy has, however, been ably and thoroughly argued by appellee's counsel. For that reason, this brief will instead concentrate solely upon a point which, though closely and inescapably bound together in with the jeopardy issue, has not been made the focus of argument either in this Court or below.

That point is whether a trier of fact's independent determination of criminal guilt by means of the mere consideration of the cold record of proceedings held before a subordinate officer, without himself hearing and seeing the witnesses present their testimony, is a process which is sufficiently reliable to be considered the due of an individual accused of a serious crime.

This issue is placed in the immediate background of the double jeopardy controversy by virtue of the assertions of both the appellants and the Maryland Court of Appeals that Maryland juvenile cases are not, in fact, decided by the masters who hear them, but by judges who review a mere record of the master's proceedings.

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in the instant record, the present custom in Baltimore County is for the proceedings to be tape recorded [see App. 44, 55]. California practice is for the judge to read a stenographic transcript when objection to referee findings originates with the minor (California Welf. & Inst. Code § 252); when it originates with the state, a referee's findings might be vacated solely on the basis of representations by the prosecuting attorney. (Donald L. v. Superior Court (1972) 7 Cal.3d 592, 598-599; 101 Cal. Rptr. 850, 498 P.2d 1098.)

For reasons we shall elaborate below, we think practice of "trial-by-transcript" cannot be depended upon to reach factually accurate results in any case wherein the evidence is in conflict. It thus does not measure up to the elemental requirements of fairness and reliability which are embodied in the concept of due process of law. (In re Winship (1970) 397 U.S. 358.)

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A. The Nature Of The Trial-By-Transcript Problem In California: Subordinate Judicial Officers With Unlimited Powers To Hear Cases, But No Power To Decide Them

Like Maryland, California employs a species of subordinate judicial officer, known locally as a referee, to adjudicate the bulk of cases wherein juveniles are accused of criminal conduct. (Gough, Referees in California Juvenile Courts, A Study in Sub-judicial Adjudication (1967) 11 Hast. L.J. 3.) Like his Maryland counterpart, the California referee serves at the pleasure of the court which appoints him; if originally appointed prior to a certain date, he need not even be a lawyer. (California Welf. & Inst. Code § 553; Md. Ann. Code & Jud Proc. Art, § 3-813(a).) He is not subject to appointment by any public official who is directly responsible to the electorate; nor is his appointment subject to Legislative confirmation. He is not required to run for election himself, and is not subject to discipline by the state's commission on judicial performance. (See California Const. Art. VI, §§ 8,

18(a).)

Pursuant to Article VI, section 22 of the California Constitution, the referee is limited to the performance of "subordinate judicial duties". As a descendant of the special master in Chancery, his conclusions are advisory only; before they may constitute a judgment of the court, a duly authorized judge must adopt them as his own, exercising his own judgment, independent of that of the referee. (In re Edgar M. (1975) 14 Cal.3d 727, 734, 736; 122 Cal. Rptr. 574; 537 P.2d 406; cf. In re Anderson (Md. 1974) 321 A.2d 516, 525-527.) As this Court long ago noted, "It is not within the general province of a master to pass on all the issues in an equity case. . . . [The Court] cannot . . . abdicate its duty to determine by its own judgment the controversy presented and devolve that duty on any of its officers." (Kimberly v. Arms (1889) 129 U.S. 512, 524.)

Notwithstanding these inherent limitations on the decision making powers of referees and masters, in juvenile cases both California and Maryland have radically expanded the hearing powers of their

subordinate judicial officers, so that they are now authorized to preside over entire trials of allegations of criminal wrongdoing by minors, in cases ranging from malicious mischief to premeditated murder. While so presiding, for example, the California referee is clothed with "the same powers as a judge". (California Welf. & Inst. Code § 248.)

Historically, subordinate judicial officers such as referees were limited to the performance of ministerial acts such as ex parte "chamber business" between terms of Court (Rooney v. Vermont Investment Corp. (1973) 10 Cal.3d 351, 361; 110 Cal. Rptr. 353; 515 P.2d 297; see Von Schmidt v. Widber (1893) 99 Cal 511, 512-513, 34 Pac 109); or to the performance of "services, mainly of a clerical character, in the progress of a case". (Ennesser v. Hudek (1897) 169 Ill. 494; 48 N.E. 673, 674; see Cal. Code Civ. Proc. § 639(1) (authorizing involuntary reference solely for the "examination of a long account); Cal. Gov't. Code § 72401 (defining the powers of a

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traffic referee),[2] cf. 28 U.S.C. § 636(b) (defining powers of United States Magistrates)[3].)

It has been the lack of final decision making authority on the part of both California's referees and Maryland's masters which has led both states to advance a grotesque distortion of traditional double jeopardy doctrine in the form of an argument that even though the proceedings

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(2) "(a) With respect to any misdemeanor violation of the Vehicle Code, he may fix the amount of bail, grant continuances, arraign the defendant, hear and recommend orders to be made on demurrers and motions other than for continuances, take pleas and set cases for hearing or trial.

. . .

"(b) With respect to any infraction, he may have the same jurisdiction and exercise the same powers and duties as a judge of the Court." [An infraction is not punishable by imprisonment. Cal. Pen. Code § 19c.)

(3) "(a) A judge may designate a magistrate to hear and determine any pre-trial matter, except a motion for injunctive relief. . . . A judge may reconsider any pre-trial matter . . . where it has been shown that the magistrate's ruling is clearly erroneous or contrary to law." (. . .)

before the referee are before an officer of a court which has jurisdiction over the case,[3a] and have, in reality, every feature associated with the plenary trial of a criminal case, the referee's lack of authority to decide such cases prevents jeopardy from attaching or terminating in connection with the proceedings. (In re Anderson, supra, 321 A.2d 516 at 523-524;[4] Jesse W. v. Superior Court (Ct. App. 1970) 133 Cal. Rptr. 870; In re Dale S. (1970) 10 Cal.App.3d 952, 955-956; 89 Cal. Rptr. 499; In re Bradley (1968) 258 Cal.App.2d 253, 258 65 Cal. Rptr. 570.)

As a predictable result of the disharmonious expansion of the hearing powers of subordinate judicial officers, specially

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(3a) Blackstone, for example, defines a "court" as being, "any place where justice is judicially administered". (3 Blackstone, Commentaries §23.)

(4) Maryland in particular carries the argument ad absurdum by variously comparing a trial before a master to a preliminary hearing before a magistrate and a coroner's inquest. (In re Anderson, supra, 321 A.2d at 524-525.) Unlike such proceedings, a hearing before a referee or master purports to determine actual guilt -- not mere probable cause.

acute problems have arisen with respect to the manner in which Judges are to perform their function of determining the facts of a case, using judgment independent of that of his subordinate. Where before only the checking of an account [see Cal. Code Civ. Proc. § 639(1)] or review of a recommended ruling on a demurrer was required, the judge is now required to somehow pick between a welter of conflicting testimony which appears on the pages of a transcript and to decide whether the referee has correctly determined whether criminal guilt was established beyond a reasonable doubt.

We think such a decision making process to be impermissibly haphazard and unreliable; where the question involved is one of such fundamental importance to both individual and society as the determination of an accused individual's liberty, its unreliability places it in direct conflict with the Fourteenth Amendment's guarantee

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of due process of law.(5)

California has gone perhaps the furthest of any state in expressly maintaining it to be acceptable for a judge to base his decision of the case upon his mere reading, in private, of a reporter's transcript of

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(5) We note that at least where adults are involved, the California Legislature has taken great pains to insure that subordinate judicial officers do not adjudicate the merits of any civil or criminal matter where important interests are involved. (Burns v. Superior Court (1903) 140 Cal 1, 12-13; 73 Pac 597; see Washburn v. Washburn (1942) 49 Cal.App.2d 581, 589; 122 P.2d 96. (divorce case)) In California, the only context in which a subordinate officer may adjudicate a case is that of Vehicle Code infractions, which do not involve the possibility of incarceration. (California Pen. Code § 19c; see California Gov't Code § 72401, quoted in note 2, ante.)

the proceedings.[6]

"[California Welf. & Inst. Code] section [252] empowered the judge to deny the minor's application for rehearing only after reading the reporter's transcripts of the two proceedings on which the referee had based his findings and orders. . . . . Thus, a judge's decision to deny the [minor's] application for ["live"] rehearing and hence adopt the referee's determinations as those of the Court is based on data amply sufficient for forming a judgment independent from that of the referee. . . ." (In re Edgar M., supra, 14 Cal.3d at 727, 735-736; 122 Cal. Rptr. 574, 537; P.2d 406.)

Subsequent California appellate decisions have given even heavier emphasis to the notion that reading a transcript is a perfectly acceptable way to determine the facts in

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(6) The California Court of Appeal's opinion in Jesse W. v. Superior Court, supra, 133 Cal. Rptr. 870 suggests that a judge may overturn a referee without even reading the transcript. See also Donald L. v. Superior Court, supra, 7 Cal.3d 593; 101 Cal. Rptr. 850; 498 P.2d 1098.

a contested criminal case. One Court has held that the "substantial evidence" standard which is commonly employed on appeal may not be (openly) employed by the judge; he must independently weigh the evidence de novo. (In re Randy R. (1977) 67 Cal.App. 3d 41; 139 Cal. Rptr. 419.)

Two other courts have carried forth in the "worst of both worlds"[7] double standard so commonly applied in juvenile matters by rejecting the teachings of four centuries of legal history by proclaiming, in effect, that the credibility of a witness can be made to emanate from the pages of a transcript. (In re Jay J. (1977) 66 Cal. App.3d 631, 633-634; 136 Cal. Rptr. 125; In re Gregory M. (1977) 68 Cal.App.3d 1085, 1093; 137 Cal. Rptr. 756 .[8]

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(7) See Kent v. United States (1966) U.S. 541, 556.

(8) The latter two cases employ the intellectual technique of misconstruing the minor's objections to the practice of trial-by-transcript as being objections to the mere title of the referee. This intellectual technique contrasts starkly with that used to characterize referees in cases which turn back claims of double jeopardy following a finding of innocence. (see pp. 9-13, ante.)

B. Due Process and Equal Protection Both Demand That Where Liberty Is At Stake, The Most Reliable - Not The Most Mediocre - Factfinding Methods Be Employed

At this point, we wish to stress that it is not our purpose here to assert that the federal constitution bars states from creating a separate trial judiciary for juveniles, perhaps with different qualifications than those required of other judges, and designating their title as referees or masters. What we do argue is that the constitution does not permit a state to vest plenary decision making authority over criminal or quasi-criminal cases in one class of judicial officer, while requiring the accused to stand trial before another. If accused juveniles are to be made to stand trial before referees or masters, in other words, then the states must give such officers the power to decide the cases they hear.(9)

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(9) A peripheral, but quite important consideration involved here is the need to preserve that uniquely informal quality

It is with this qualification in mind that we shall proceed to analyze and discuss the question of whether it is consistent with the Fourteenth Amendment's guarantee of due process of law for a case to be decided, on the trial level, by one who merely reads a transcript of evidence heard by another.

Liberty stands next only to life itself as the most precious of values. The degree of care and accuracy which must attach to factfinding in a proceeding affecting this interest must therefore be the highest of all. To begin, we recall the general

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traditionally associated with the juvenile process which this court has stressed to be the chief reason for permitting maintenance of a separate system of juvenile courts. (see e.g., McKeiver v. Pennsylvania (1971) 403 U.S. 528, 545.) California's recent experience with trying to maintain a system of trial before subordinate judicial officers has led to the injection of such a degree of litigous formality into the juvenile process that an anti-trust case now almost seems simple by comparison. (See In re Lionel P., (1977) 20 Cal.3d 260; ___ Cal. Rptr. ___, ___; ___ P.2d ___; In re Teddy Y. (1977) 74 Cal. App.3d 455, ___ Cal. Rptr. ___.)

statement of this proposition which this Court made twenty years ago in Speiser v. Randall (1958) 357 U.S. 513, 520: "To experienced lawyers, it is commonplace that the outcome of a lawsuit . . . . depends more often upon how the factfinder appraises the facts than on a disputed construction of a statute . . . . Thus the procedures by which the facts of the case are determined assume an importance fully as great as the substantive rule to be applied. And the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights." (Emphasis added.)

Even before Speiser, moreover, the Court had expressly disapproved of the separation of the hearing and decision making functions in criminal cases: "One of the essential elements of the determination of crucial facts is the weighing and appraising of the testimony . . . We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceedings, the equivalent of the judge's own exercise of the function of the

trier of facts". (Holiday v. Johnston (1941) 313 U.S. 342, 352.)

In 1971, the Court gave further elaboration to its insistence on the factual integrity of criminal cases in In re Winship (1970) 397 U.S. 358, where it was declared that a juvenile accused of crime must be proven guilty beyond a reasonable doubt.

"The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both becuase of the possibility he may lose his liberty upon conviction and because of the certainty that he would be stigmatized. . . .

"There is always in litigation a margin of error . . . where one party has at stake an interest of transcending value . . . this margin or error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder . . . beyond a reasonable doubt .

"Moreover, the use of the reasonable doubt standard is indispensable to command the respect and confidence of the commu-

nity. . . . It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. . . ." (In re Winship, supra at 364-365.)

The years following Winship have seen the Court take several other opportunities to declare in ever stronger terms that there is little, if anything to distinguish the trial of a juvenile from that of an adult. (Breed v. Jones (1975) 421 U.S. 519; see Gagnon v. Scarpelli (1973) 411 U.S. 778, n.12 at 790.)[10] The California Supreme Court has as well recognized that in the factually contested case, it is appropriate to conduct the proceedings in as formal and careful a manner as would apply in a criminal case. (People v. Superior Court (Carl W.) (1975) 15 Cal.3d 271, 279; 124 Cal.Rptr. 47, 539 P.2d 807.)

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10. See Supreme Court Review (1975): Juvenile Law - Double Jeopardy (1975) 66 J. Cr. L & Crim. 408, 415.

It is of obviously equal importance that the method of proof, aside from the theoretical quantum of proof, not leave people in doubt whether the innocent are being condemned. As should now be clear, such doubts are magnified to intolerable levels where the method employed renders any quantum requirement largely meaningless through its inability to preserve that indispensable part of the evidence consisting of the "wordless language" imparted by the live witness.

C. As Demeanor Does Not Shine Through The Lines Of A Cold Reporter's Transcript, Trials By Transcript Can Never Be More Than Trials By Substantial Evidence

The most informative, accurate, and fair manner for a trier of fact to consider the testimony of a witness is for that trier to see and hear the testimony given before him. Because it is impossible to assess the demeanor of witnesses from a cold transcript, our law has recognized from its earliest beginnings that it is unreliable and distinctly second-rate for the testimony of witnesses to be presented by means of the mere reading of notes, depositions, or transcripts. From the very beginning of the times when cases have been tried by

hearing the testimony of witnesses to the present, it has uniformly been held that such methods are only to be employed as a last resort, as where the death or absence of the witness makes in unavoidably necessary to proceed in such a manner. (Statute 5 & 6 Edw. VI, c. 11, § 12 (1552); 1 Hale Pleas of the Crown 305 (1716); Statute, 11 & 12 Vict. C. 42 § 17 (1848); Cal. Ev. Code § 1291; Fed. Rules Evid. Rule 804(b)(1), 28 U.S.C.A.)

Over a century ago, Lord Coleridge summarized the view of the common law, saying: "The most careful note must often fail to convey the evidence fully in some of its most important elements - those for which the open oral examination of the witnesses in the presence of the prisoner, judge and jury is so justly prized. It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration. . . . It is in short, the dead body of the evidence without its spirit; which is supplied, when given openly and orally, by the ear and eyes of those who receive it." (Regina v.

Bertrand (1867) 4 Moo. P.C. (N.S.) 460, 472; see also Fenwick's Trial (House of Commons, 1696) 13 How. St. Tr. 591, 638, 712: "Our law requires persons to appear and give their testimony 'viva voce', and we see that their testimony appears credible or not by their very countenances and the manner of their delivery. . . ."

The earliest reported decisions of American courts also recognized the obvious. In 1849, for example, a Georgia Court was faced with a matter in which the deposition of an available witness in a civil case had been read in evidence over objection. The court responded by saying, "When it is recollected that depositions are admitted only from the necessity of the case; that they are an unsatisfactory species of evidence not known to the common law . . . and is therefore subject to the rule of law which forbids such evidence when better evidence exists . . . [T]he oral testimony of the witness, in the presence of the court and jury is much better evidence than his deposition can be." (Hammock v. McBride (1849) 6 Ga. 178, 183.)

Though the Civil War was soon to follow, the north and south were united on at least this point; for only a year before, the New York Court had disapproved the reading of a witness' deposition in a criminal case: "[The right of confrontation] means that [the accused] shall be confronted on the trial, so that the judge and jury may have the opportunity of observing the appearance and manner of the witness, as well as hearing what he has to say - the former sometimes proving a complete antidote to the latter, as is well known to every nisi prius lawyer." (Barron v. People (1848) 1 N.Y. 386, 391.)

Through the intervening century - mental telepathy not having been perfected - our courts have continued to find facts by listening to and weighing the testimony of witnesses. That there has been no change in the limitations on the written (as opposed to the spoken) word as a tool of communication during that period was well attested by the late Jerome Frank, writing for the Second Circuit with the concurrence of Justices Augustus and Learned Hand: ". . . [T]he demeanor of the

orally testifying witness is 'always assumed to be in evidence' (citation). It is 'wordless language'. The liar's story may seem uncontradicted by one who merely reads it, yet it may be contradicted in the trial court by his manner, his intonations, . . . and the like - all matters which cold print does not preserve', and which constitute 'lost evidence' as far as an upper court is concerned. . . . A stenographic transcript . . . is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (Broadcast Music v. Havana Madrid Restaurant Corp. (2 Cir 1949) 175 F.2d 77, 80.)

Lest there be doubt that any last minute revelation of science has changed the nature of things for the jurisprudence of California in the 1970's, we aver to a contemporary California opinion on the subject, Meiner v. Ford Motor Co. (1971) 17 Cal.App. 3d 127, 140; 94 Cal. Rptr. 702: "The law has long recognized the problem of appellate review in the matter of credibility of witness based upon their demeanor. A written transcript of testimony is but a pallid

reflection of what goes on in court. . . ."

Finally, it is significant that in 1966 an Arizona appellate court, as yet unreconstructed by In re Gault [(1967) 387 U.S. 1], found itself compelled to disapprove the practice of resolving traffic cases on the basis of a reading of data presented to a referee. Such techniques, it was held, do not convey sufficient information to permit an informed, individualized decision. (Flynn v. Superior Court of Maricopa County (1966) 3 Ariz.App 354; 414 P.2d 438.)

Clearly, then, if there is one clear thread which can be drawn from the last four centuries of jurisprudential experience, it is that essential demeanor evidence is not conveyed by a written transcript. Since this is the case, it inescapably follows that a judge can not do more than determine whether substantial evidence supports his subordinate's conclusions, thus leading to trials conducted not according to the rule of reasonable doubt, but according to the substantial evidence rule.

For example, federal District Judges, re-

viewing the findings of referees in bankruptcy pursuant to 11 U.S.C. § 67(c) have been forthright in stating that they cannot, and therefore will not, second-guess findings of fact made by referees on conflicting evidence. (In re Rosenberg (2d Cir 1945) 145 F.2d 896, 898 (and authorities there cited); In re Katz (E.D.N.Y. 1938) 23 F.Supp. 429, 430; In re Zipco (S.D.Cal 1957, I.R. Kaufman, J.) 157 F.Supp. 675, 677: ". . . I must accept the referee's findings of fact unless clearly erroneous".

The Maryland Court in In re Anderson, supra, 321 A.2d at 516, also notes that the "clearly erroneous" standard is applicable to review of the findings of masters: "[T]he master's findings of fact from the evidence are prima facie correct and they will not be disturbed unless clearly erroneous."

In another context, one comparable to that here in that personal liberty is at stake, this Court condemned the practice of some federal trial judges of referring hearings on issues of fact which arose in habeas corpus cases to United States Magistrates. (Wingo v. Wedding (1974) 418 U.S.

461.)

Following the decision in Wingo, Congress reacted by amending 28 U.S.C. § 636(b) to provide for a right, in habeas corpus proceedings, to de novo determination by a judge when exceptions are taken to a magistrates determination of review of other, preliminary matters. (28 U.S.C. § 636(a).)

Clearly, there is no basis for a conclusion that judges of the superior court possess the ability to breathe life into dried peaches, dead bodies, or cold transcripts; it has been held often, for example, that such judges have no power to second-guess the judgment of a committing magistrate upon reading a reporter's transcript of a felony preliminary hearing. (People v. Hall (1971) 3 Cal.3d 992, 996; 92 Cal. Rptr. 304; 479 P.2d 664.) As we are informed by the Jay J. opinion, supra, 66 Cal.App.3d at 634, the qualifications of referees of the juvenile court are comparable to those of committing magistrates; it follows that superior judges have no greater powers to "independently" breathe demeanor evidence back into a reporter's

transcript produced by a referee than they have to breathe it into one produced by a magistrate. Perhaps the best proof of this proposition comes, however, from the fact that the justices of the California Supreme Court, who must consider themselves at least equal in ability to the judges of trial courts, deem themselves unable to perform such a feat with respect to the findings of special masters they appoint: "We are not bound by the findings of [our own] referee although they are entitled to great weight if supported on the record. (Citations)" (In re Hurlic (1977) 20 Cal.3d 317, 325 ___ Cal. Rptr. ___; ___P.2d ___.)

Trials-by-transcript can never be more than trials by substantial evidence. Such trials do not, therefore measure up to the minimum standards of factual accuracy necessary to constitute due process of law. But perhaps above all, bearing in mind that this case deals with juvenile justice, it should be said that such an impersonal practice is wholly devoid of the "concern", the "sympathy", and the "paternal attention" which have been held to justify the main-

tenance of a separate system of justice for the young. (McKeiver v. Pennsylvania, supra, 403 U.S. at 550.)

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CONCLUSION

Had not the Legislatures and highest courts of at least two states attempted to provide for the trial-level resolution of criminal cases by judicial officers who have not personally heard the evidence, one would have thought it unnecessary to belabor the point that indispensable demeanor evidence does not shine through the pages of a transcript, and that when cases are decided by judges who only read transcripts, the result can be no more than trials by substantial evidence.

That such a development has taken place within the ostensibly benevolent forum of the juvenile courts brings to mind the truth of Brandies' famous dictum that "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent". (Olmstead v. United States (1928) 277 U.S. 438, 479 [dissenting opinion].) It reminds us as well of Erskine's observation, made during the trial of Thomas Paine, that arbitrary power has never been introduced into a country all at once; always it is

introduced in slow steps, lest the people see its approach. (The Trial of Thomas Paine (1792) 22 How. St. Tr. 358, 443.)

If that part of Md. Ann. Code, Jud. Proc. Art § 3-813(c) which permits trial-level resolution of a juvenile criminal case by a judge who only reads a record of evidence presented to a subordinate passes constitutional muster, then there would be little to prevent all criminal proceedings from being decided in such a manner.

We consider abhorrent the prospect of any criminal case being decided by someone who, at least to the parties and witnesses, seems but an incorporeal entity; sitting like the Wizard of Oz behind the closed doors of his chambers while issuing forth proclamations and judgments. It thus is our hope that nothing will emerge from the Court's opinion herein which could be read as giving further inception to such practices.

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We urge, therefore, that this Court hold that the Fourteenth Amendment's guarantee of due process of law requires the states to give the power of decision to whatever class of judicial officer it empowers to hear the evidence; and that it be accordingly held that no part of section 3-183(c) is constitutional.

Respectfully submitted,

PAUL HALVONIK
State Public Defender
of California

GARY S. GOODPASTER
Chief Assistant
State Public Defender

LAURANCE S. SMITH
Deputy State
Public Defender